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No. 75-1015

In the Supreme Court of the United States

OCTOBER TERM, 1975

RALSTON PURINA COMPANY, ALLIED MILLS, INC., SECURITY MILLS, INC., and THE JIM DANDY COMPANY,

Appellants,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, ET AL.,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

BRIEF OF APPELLANTS IN OPPOSITION TO MOTION TO AFFIRM

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FOREWORD

Although the motion to affirm studiously avoids directly meeting the issues presented by appellants' jurisdictional statement, it does serve to make clear that the overriding issue is whether appellants must suffer the consequences of a grossly erroneous decision of the court below because the Commission itself did not appeal. It is common knowledge

that administrative agencies appeal only a limited number of cases decided against them. Whatever the reason, however, for the Commission's decision not to appeal, its failure to do so should not prejudice the rights of appellants, who are the real parties in interest.

I.

Appellants' first point was that the court erred in holding that the Commission's negative finding that appellees had failed to sustain their statutory burden of proof must be set aside in the absence of substantial evidence to sustain it. Appellees fail to meet this contention, but devote this portion of their motion to answering contentions which appellants do not make. Appellants do not argue, as appellees incorrectly state (Mot., p. 7), that the Commission's burden-of-proof finding need not be supported by the necessary subsidiary findings. On the contrary, appellants pointed out (J.S., pp. 6-7, 10) that the Commission's conclusion was supported by numerous findings. Appellees seek to dismiss these findings as "nothing more than conclusions supporting conclusion". (Mot., p. 6) But this is not the case, as can be plainly seen. The Commission did rely on these subsidiary findings in support of its conclusion that appellees had failed to meet their burden of proof.

In any event, the district court did not set the order aside for lack of necessary findings. It set it aside because, in the court's view, the Commission's negative burden-of-proof finding was not supported by substantial evidence. Although appellees deny this under point I, they specifically concede this under point II. (Mot., p. 8) As appellants pointed out, such a holding is anomalous and does not make sense. (J.S., pp. 9-11) Appellees never address this issue.

II.

Appellants' second contention was that the court substituted its judgment for that of the Commission as to the reasonableness of the proposed tariff change. Appellees attempt to meet that contention by arguing that the district court's statement was "nothing more than dicta and does not reflect the specific holding of the lower court". (Mot., p. 7) We submit that the court's own language belies appellees' contention. After finding that the Commission's burden-of-proof finding was not supported by substantial evidence, the court said (J.S., App. pp. 7-8):

> To the contrary, the record reveals by substantial evidence that the burden has been met and that the tariff modification seems just and reasonable under the circumstances.
>
> Therefore, it is the decision of the Court that the order of the Commission concerning these proposed rate modifications issued in May, 1974, is hereby set aside. Further it is our considered judgment that a remand of this case to the Interstate Commerce Commission would not serve any useful purpose.

Such a precise holding cannot be passed off as mere dicta. If that was not the reason why the district court set aside the order and refused to remand the case to the Commission, then it had no reason at all for its decision.

III.

Appellants' third contention was that the district court erred in refusing to remand the case to the Commission. Against that contention, appellees make three arguments.

First, they argue that appellants cannot raise this point because they did not join in the Commission's motion for remand or make a similar motion of their own. The language of the opinion made it abundantly clear that the district court had firmly made up its mind on that point.

Appellants had no obligation to waste time and money on such a vain endeavor, the wisdom of which was confirmed by what happened to the Commission's motion. There is no principle of judicial review that erroneous decisions of district courts cannot be appealed in the absence of a motion for rehearing or amendment of the opinion.

Second, appellees having strongly urged in the district court that their own evidence showed they would be better off if they lost the traffic, and having obtained a specific finding on that point in their favor, now try to disavow both the finding and their own evidence. Their statement (Mot., p. 10) that the court "did not rely on Appellees' evidence that the loss of feed traffic would result in improvement of Appellees' financial position, but simply noted in passing that this was the only evidence of record on this point" is not correct. The court's finding was as follows (J.S., App. pp. 6-7):

> Further, the Court finds no substantial evidence to support the Commission's finding that the rail carriers would experience a loss of revenue by increasing their rates. The only basis for their conclusion in this regard is the unsupported forecasts of the shippers. *To the contrary, the plaintiffs' evidence shows that the railroads have incurred a loss of revenue from the transportation of meal, and this uncontroverted evidence supports their position. It is clearly established that if there should be a diversion of meal traffic as predicted by the shippers, the carriers would actually be in a better financial position than at present.* (Tr. 35, 36; Exhibit 1, p. 13). [Emphasis added.]

Again, the specific finding belies appellees' contention. It shows that the court did indeed rely heavily on such evidence, and that the finding quoted was one of the principal reasons it refused to remand the case to the Commission.

Appellees' statement (Mot., p. 10) that appellants did not rebut that evidence or press their objection to it is likewise incorrect. Appellants rebutted that evidence by cross-examination of appellees' own witness (J.S., p. 15). Appellants also pressed their objection to the evidence, stating, with respect thereto, on page 30 of their brief:

> Protestants renew their objection to this appendix and move to strike it.

Third, appellees argue that, even if the case were remanded to the Commission, appellants could not prevail on the merits on the issue of undue preference and prejudice. Such an argument is irrelevant to any issue here. Whether rates are unduly preferential and prejudicial is for the Commission to decide. (J.S., p. 16).

CONCLUSION

For the reasons above set forth, appellees' motion to affirm should be denied and appellants should be granted the relief prayed for in their jurisdictional statement.

Respectfully submitted,

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